

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of

OAH No. L2006080498

**EVAN G.,**

Claimant,

v.

**TRI-COUNTIES REGIONAL CENTER,**

Service Agency.

**DECISION**

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on October 5, 2006, in Santa Barbara, California.

Kelli G., Mother of Evan G. (Claimant), represented Claimant.

Phil Dauterman, Manager, Tri-Counties Regional Center (Service Agency) represented the Service Agency as the Executive Director's Fair Hearing Designee.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on October 5, 2006.

**FACTUAL FINDINGS**

1. Claimant, through his parents, filed a request for a due process hearing on or about August 7, 2006. Claimant contends he is entitled to one hour per week of speech therapy, and that the Service Agency has failed to provide that service, contrary to his Individual Program Plan (IPP).

2. The Service Agency does not dispute Claimant needs one hour per week of speech therapy; however, it contends the law and its state contract<sup>1</sup> impede its ability to

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<sup>1</sup> The Service Agency's contract with the Department of Developmental Services requires the Service Agency to "render services to persons with developmental disabilities in accordance with applicable federal and California statutes, regulations, *ARC v. DDS* (1986) 38 Cal.3d 384 and the terms of the contract [itself]." (Exhibit 1, italics added.)

provide the needed speech therapy because all available speech therapists' hourly rate of pay exceeds the maximum amount the Service Agency is allowed to pay.

3. The questions in Claimant's appeal are: 1) Must the Service Agency provide Claimant one hour per week of speech therapy? 2) Can the Service Agency pay a rate greater than the Schedule of Maximum Allowances for Claimant's speech therapy?

4. At an IPP meeting on December 1, 2004, Claimant's planning team concluded Claimant needed one hour per week of speech therapy. The Service Agency stipulated Claimant continues to need that level of speech therapy.

5. For the past two years, a speech therapist had been providing Claimant with speech therapy. However, on or about July 24, 2006, the speech therapist ended those services because the Service Agency's rate of pay to the therapist was inadequate. She generally received approximately \$115 per hour, and was willing to consider a pay rate of approximately \$85 per hour. The Service Agency was not able to pay the reduced rate. The Service Agency could pay the speech therapist a maximum of \$45 per hour. The rate of \$45 per hour is the maximum payment rate allowed by state regulation, the schedule of maximum allowances (SMA), as set by the Medi-Cal program and followed by the Department of Developmental Services (DDS). (See, Legal Conclusion 7, *post*.) The speech therapist would not accept the \$45 per hour rate, thus leading to the cessation of therapy in July 2006. The Service Agency and Claimant inquired with other speech therapy providers who could serve Claimant's needs, but neither found one willing to accept the state mandated rate.<sup>2</sup>

6. In approximately September 2006, the Service Agency investigated the pay rates of speech therapists in the Santa Barbara area and found speech therapists had rates between \$74 and \$130 per hour. The Service Agency agrees there are no speech therapists who can meet Claimant's needs for the SMA rate of pay. The Service Agency understands Claimant's predicament is a problem for him and potentially for others similarly situated and, consequently, the Service Agency is pursuing discussions with DDS to elicit its assistance.

7. The Service Agency sought out other options to meet Claimant's needs. It considered using other service codes that would allow a greater rate of pay. However, there was no other reasonably applicable service code for speech therapy.

8. Though the Service Agency did not intend to disrupt Claimant's services, and since the Service Agency did not find a provider willing to accept the state mandated rate of pay for on-going services, Claimant has not received speech therapy since approximately July 24, 2006.

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<sup>2</sup> In August 2006, one speech therapist, who would accept the Service Agency's rate of pay, was available, but only for a maximum of three weeks.

## LEGAL CONCLUSIONS

1. Cause exists to grant Claimant's appeal, as set forth in Factual Findings 1-8, and Legal Conclusions 2-13.

2. Welfare and Institutions Code section 4502 states in pertinent part:

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following:

(a) A right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitations services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible.

3. Welfare and Institutions Code section 4690 states:

The Director of Developmental Services shall establish, maintain, and revise, as necessary, an equitable process for setting rates of state payment for nonresidential services purchased by regional centers, and may promulgate regulations establishing program standards, or the process to be used for setting these rates, or both, in order to assure that regional centers may secure high-quality services for developmentally disabled persons from individuals or agencies vendored to provide these services. In developing the rates pursuant to regulation, the director may require vendors to submit program, cost, or other information, as necessary. The director shall take into account the rates paid by other agencies and jurisdictions for comparable services in order to assure that regional center rates are at competitive levels. In no event shall rates established pursuant to this article be less than those established for comparable services under the Medi-Cal program.

4. Welfare and Institutions Code section 4646, subdivision (a) states in pertinent part:

(a) It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

5. Welfare and Institutions Code section 4648 states in pertinent part:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

[§] . . . [§]

(4) [A] regional center may contract or issue a voucher for services and supports provided to a consumer or family at a cost not to exceed the maximum rate of payment for that service or support established by the department.

(5) In order to ensure the maximum flexibility and availability of appropriate services and supports for persons with developmental disabilities, the department shall establish and maintain an equitable system of payment to providers of services and supports identified as necessary to the implementation of a consumers' individual program plan. The system of payment shall include provision for a rate to ensure that the provider can meet the special needs of consumers and provide quality services and supports in the least restrictive setting as required by law.

[§] . . . [§]

(g) Where there are identified gaps in the system of services and supports or where there are identified consumers for whom no provider will provide services and supports contained in his or her individual program plan, the department may provide the services and supports directly.

6. Welfare and Institutions Code section 4669.2, subdivision (a) states in pertinent part:

(a) Notwithstanding any other provision of law, and provided that there shall be no reduction in direct service to persons eligible for services under this article, a regional center, with the approval of the State Department of Developmental Services, and in consultation with the local area boards, consumer and vendor advisory committees, and local advocacy organizations, may explore and implement any regional center service delivery alternative included in this section for consumers living in the community, as follows:

[§] . . . [§]

(3) Procedures whereby regional centers may negotiate levels of payment with providers for delivery of specific services to a group of consumers through a mutually agreed upon contract with a specific term and a guaranteed reimbursement amount. Contracted services may be for any specific service or combination of services across vendor categories.

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7. California Code of Regulations, title 17, section 57210, subdivision (a) states in pertinent part:

[¶] . . . [¶]

(14) “Schedule of Maximum Allowances (SMA)” means the schedule of the maximum allowable rate for the service provided as established by the Department of Health Services (DHS) for services reimbursable under the Medi-Cal program. If the vendor’s usual and customary rate is less than the maximum rate allowed pursuant to the SMA, the regional center shall pay the vendor’s usual and customary rate.

8. The Service Agency considers itself constrained and unable to pay a rate greater than the \$45 per hour rate of pay, the Medi-Cal program’s SMA. (Cal. Code Regs., tit. 17, § 57210, subd. (a)(14); see also, Welf. & Inst. Code §§ 4690 & 4648, subd. (a)(4).) As it argued at hearing, the Service Agency’s contract with DDS requires the Service Agency to provide services in accordance with federal and state statutes and regulations, as well as applicable case law. If the Service Agency paid a speech therapist a rate greater than the SMA rate, it would violate the applicable statutory and regulatory provisions, and the Service Agency would breach its contract with DDS. (*Ibid.*)

9. Nevertheless, the Service Agency violates the law if it holds to its current position. If the Service Agency does not pay a rate greater than the SMA rate, and Claimant continues without speech therapy, an undisputed necessary service in his IPP, then the Service Agency violates other statutory and regulatory provisions, as well as applicable case law (and consequently, remains in breach of contract with DDS). Saliently, if the Service Agency does not act to provide Claimant with speech therapy, the Service Agency violates a (arguably the) central and predominant purpose of the Lanterman Act: the provision of needed services to persons with developmental disabilities. (Welf. & Inst. Code §§ 4502, subd. (a), 4646, subd. (a), & 4648, subd. (a).)

10. Furthermore, when the California Supreme Court analyzed the Lanterman Act’s directives to the regional centers regarding the implementation of IPPs, the State’s High Court stated unequivocally, “[w]hile it is true, as the Attorney General has observed, that the regional centers have ‘wide discretion’ in determining *how* to implement the IPP [citations], they have no discretion at all in determining *whether* to implement it: they must do so [citation].” (*ARC v. DDS*, 38 Cal.3d 384, 390, original italics.) Here also, the Service Agency must implement Claimant’s IPP. The Legislature’s insistence on having the needs of persons with developmental disabilities met by the provision of services is so significant that the Legislature directs DDS itself to provide services directly to consumers in cases like this one, where “there are identified gaps in the system of services and supports or where there are identified consumers for whom no provider will provide services and supports contained in [his] individual program plan.” (Welf. & Inst. Code § 4648, subd. (g).)

11. The Service Agency is capable of providing Claimant's speech therapy through an appropriate provider if it pays a rate greater than the SMA rate. The SMA rate, which the Legislature presumes "ensure[s] the maximum flexibility and availability of appropriate services and supports" and "ensure[s] that the provider can meet the special needs of consumers" (Welf. & Inst. Code § 4648, subd. (a)(5)) does not do so in this case. The evidence proved that the SMA rate provided no such flexibility or availability, and resulted in Claimant's need for speech therapy to go unmet. The Service Agency will therefore better carry out its obligations under the Lanterman Act by paying a greater rate and implementing Claimant's IPP, than by not providing Claimant a needed service and frustrating the statute's principal purpose. What the Legislature requires of the Service Agency is that, in implementing Claimant's IPP, the speech therapy be effective in meeting his needs and that it balance that effectiveness with the cost-effective use of public resources. (Welf. & Inst. Code § 4646, subd. (a).)

12. In this case, it is appropriate that the Service Agency implement Claimant's IPP, paying a cost-effective rate, greater than the SMA rate, for Claimant's speech therapy.

13. The parties both asserted this problem besets more than just Claimant. In such circumstances, the Legislature allows a possible negotiated rate for an aggregate number of affected consumers with willing providers and additional actions. (See, Welf. & Inst. Code § 4669.2, subd. (a)(3).) However, this case was not filed on behalf of a representative group. This Decision applies solely to Claimant, whose particular needs were established by the evidence and by the parties' stipulation. An analysis of any larger problem affecting other individuals is not appropriate in this Decision and not applicable to this matter as pled.

### **ORDER**

Claimant's appeal is granted. The Service Agency shall approve a cost-effective rate of pay greater than the SMA rate for speech pathology to engage a speech therapist who will provide Claimant with speech therapy one time per week for one hour. In an IPP meeting to be held as soon as reasonably possible, Claimant's planning team shall meet and decide on an appropriate provider, pursuant to Welfare and Institutions Code section 4648, subdivision (a)(6). Claimant's planning team shall decide on an appropriate provider no later than 30 days from the effective date of this Decision.

Dated: October 13, 2006

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DANIEL JUAREZ  
Administrative Law Judge  
Office of Administrative Hearings

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.